No. 80-1020

In the Supreme Court of the United States

October Term, 1980

RALPH W. ADAMS, et al.,
Petitioners,

vs.

NICHOLAS E. D'ANDREA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

CHAMP LYONS, JR.
(Counsel of Record)
P. O. Box 2767
Mobile, Alabama 36652
(205) 432-5521

THOMAS S. LAWSON, JR.
P. O. Box 2069
Montgomery, Alabama 36103
Attorneys of Record for Petitioners

Of Counsel:

COALE, HELMSING, LYONS & SIMS
P. O. Box 2767
Mobile, Alabama 36652

CAPELL, HOWARD, KNABE & COBBS, P.A.
P. O. Box 2069
Montgomery, Alabama 36103

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

I. The First Amendment Argument Is Not a Subordinate Issue and the Holding of the Court of Appeals Is More Than "Apparent Dictum" 1

II. Respondent's Effort to Shift the Blame to the Jury Presupposes Propriety of Jury Consideration 2

CONCLUSION 4

CASES CITED

St. Amant v. Thompson, 390 U.S. 727 (1968) 3

No. 80-1020

In the Supreme Court of the United States

October Term, 1980

RALPH W. ADAMS, et al.,
Petitioners,

vs.

NICHOLAS E. D'ANDREA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Petitioners' basic position remains the same and the salient points in support thereof have been covered in their initial brief. For clarification we submit the following comments upon arguments first raised in the brief in opposition.

I.

The First Amendment Argument Is Not a Subordinate Issue and the Holding of the Court of Appeals Is More Than "Apparent Dictum"

Contrary to respondent's assertion at page 3 of his Brief in Opposition, the petitioners urged the District Court at trial (in which appellate counsel for respondent did not participate) to direct a verdict and to grant judgment n.o.v. (which the District Court granted) on the ground, among others, that the conduct of the plaintiff on the occasion made the basis of his claim for deprivation of

constitutional right was not constitutionally protected. In the Court of Appeals, the second of four areas of argument presented in appellees' brief dealt with the issue of absence of constitutionally protected activity. In oral argument, in which lead appellate counsel for respondent did not participate, much attention was directed to the First Amendment issue. The adverse ruling of the Court of Appeals on this contention is absolutely central to the reversal of the judgment by the Court of Appeals. Respondent's contention that the First Amendment question is a subordinate issue or "apparent dictum" is therefore erroneous.

II.

Respondent's Effort to Shift the Blame to the Jury Presupposes Propriety of Jury Consideration

Respondent's attempt to shift to the jury the blame for this untoward result presupposes the correctness of delivery of the issue to the jury in the first instance. The District Court obviously had second thoughts on the matter as is borne out by the entry of an order granting judgment n.o.v. which the Court of Appeals saw fit to reverse.

The undisputed factual setting of the communication, an inherently improbable, unverified yet easily verifiable and false rumor is per se reckless and the determination of reckless disregard presents no fact question as to which reasonable minds should differ. Respondent, in his effort to bolster the unfounded jury verdict, alludes to other matters of improbable rumor communicated by respondent. However, the truth or falsity of those rumors was not relevant since the District Court expressly ruled that there was no direct or circumstantial evidence of these other rumors being brought to the attention of the petitioners and therefore refused to receive evidence of their truth or falsity. See R. 322-323. Thus, the jury verdict cannot

draw any strength from the effect of proof of communication of other rumors.

Respondent, having the burden of proof, offered evidence of knowledge of the petitioners *only* as to the Alaskan pipeline caper. In that connection, respondent offered absolutely no evidence that he believed the rumor to be true at the time he passed it on and at the trial offered no evidence that the rumor was in fact true. In face of absence of any contention by the respondent that he actually believed the rumor to be true at the time he published it, the respondent's reliance on *St. Amant v. Thompson,* 390 U.S. 727 (1968) for the proposition that the issue presented was a jury question is misplaced. The role of the fact finder alluded to by this Court in *St. Amant v. Thompson, supra* at 732, had to do with evaluation of a speaker's testimony that he published with a belief that the statements were true. This Court then observed that a publisher's profession of good faith would not be persuasive where ". . . the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation". *St. Amant v. Thompson, supra* at 732. The instant case lacks the ingredient of testimony that the respondent published with the belief that the statement was true. Absent this element of proof, nothing is presented for the fact finder and all that remains is the unchallenged evidence of an inherently improbable statement uttered without any attempt at verification in circumstances where it was undisputed that respondent could easily have made such investigation.

If the finding of fact by the jury in the instant case had been based on conflicting evidence, respondent's arguments would have merit. Here, the question of reckless disregard should never have been submitted to the jury. Judgment notwithstanding the verdict is precisely de-

signed to overturn a verdict not based on substantial evidence. The jury verdict in the instant case suffers from such defect and it is therefore not dispositive of the question presented in this Court as respondent asserts. The District Court properly found the verdict lacking in evidentiary support and the reinstatement of that judgment by the Court of Appeals was erroneous.

CONCLUSION

Respondent's effort to minimize the error of the Court of Appeals by brushing it aside as "apparent dictum" and his effort to shift the responsibility to the "finder of fact" is not a sufficient justification to decline review. We respectfully submit that the Court of Appeals' unauthorized expansion of the reach of First Amendment protection is due to be corrected.

Respectfully submitted,

CHAMP LYONS, JR.
(Counsel of Record)
P. O. Box 2767
Mobile, Alabama 36652
(205) 432-5521
THOMAS S. LAWSON, JR.
P. O. Box 2069
Montgomery, Alabama 36103
Attorneys of Record for Petitioners

Of Counsel:
COALE, HELMSING, LYONS & SIMS
P. O. Box 2767
Mobile, Alabama 36652
CAPELL, HOWARD, KNABE & COBBS, P.A.
P. O. Box 2069
Montgomery, Alabama 36103